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9 and Kim Kenney

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF WASHINGTON AT SPOKANE
12

13 EMERSON WEBB; and all others similarly)
14 situated,)

15 Plaintiff,)

16 v.)

17 UNIFUND CCR Partners, *et al.*)

18 Defendants.)
19)
20)
21)

Case No. 2:09-cv-00081-LRS

DEFENDANTS' UNFUND
CCR PARTNERS' AND KIM
KENNEY'S REPLY IN
SUPPORT MOTION FOR
DISMISSAL

22 Not surprisingly, Plaintiff argues that he needs discovery to develop his claims.
23 No amount of discovery can change that Plaintiff's claims all fail as a matter of law.
24 The purpose of a motion to dismiss under Rule 12(b)(6) is to "streamline litigation by
25 dispensing with needless discovery and fact finding." *Neitzke v. Williams*, 490 U.S.
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1 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Such a motion allows the court
2 to dismiss actions that are fatally flawed in the legal premises and destined to fail,
3 thereby sparing litigants the burden of unnecessary pretrial and trial activity.
4 *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160
5 (Fed. Cir. 1993). That is exactly the case here. As discussed below, Plaintiff failed to
6 address many of Unifund's arguments and authority, failed to distinguish the authority
7 he did address, and failed to state a claim upon which relief may be granted.
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10 **I. UNIFUND IS PROPERLY REGISTERED TO COLLECT DEBT IN THE**
11 **STATE OF WASHINGTON**

12 **A. Unifund is registered to collect debt with the Department of Licensing.**

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14 Contrary to Plaintiff's allegations in Paragraphs 9.6 and 9.7 of his Complaint,
15 Unifund's Memorandum conclusively shows that it is and was at all relevant times
16 registered as a collection agency in the State of Washington. (Memorandum at 6,
17 Doc. 11.) This information was publicly available to Plaintiff from the Department of
18 Licensing (including on the Department of Licensing's website) when Plaintiff filed
19 his Complaint, but he ignored it. In light of Plaintiff's clearly unsupported allegations
20 in his Complaint, he did not further dispute Unifund's registration as a collection
21 agency in his Response to Unifund's Memorandum. Therefore, it is beyond dispute
22 that the status of Unifund's registration as a collection agency cannot support a claim
23 under the FDCPA, WCAA, or WCPA.
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1 **B. To collect debt, Unifund is not required to register as a foreign**
2 **corporation.**

3 Unifund's Memorandum also conclusively shows that its collection agency
4 license is the only license it needs to collect debt. (Memorandum at 6, Doc. 11.)
5 Plaintiff's entire argument to the contrary is that Unifund did not also register as a
6 foreign corporation under RCW § 23B.15.010(1). However, as set forth below, a debt
7 collector is not required to register under that statute because collecting debt (and
8 bringing lawsuits) does not constitute "transacting business." Moreover, as a general
9 partnership, Unifund would not be required to register under that statute for any
10 purpose.
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13 The statute upon which Plaintiff relies, RCW § 23B.15.010(1), provides that a
14 corporation "may not transact business in this state until it obtains a certificate of
15 authority from the secretary of state." Pursuant to RCW § 23B.15.010(2):
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18 (2) The following activities, among others, do not constitute transacting
19 business within the meaning of subsection (1) of this section:

20 (a) Maintaining or defending any action or suit or any administrative or
21 arbitration proceeding, or effecting the settlement thereof or the
22 settlement of claims or disputes;

23 . . .

24 (h) Securing or collecting debts or enforcing mortgages and security
25 interests in property securing the debts;

26 RCW § 23B.15.010(2)(a); RCW § 23B.15.010(2)(h).

1 Plaintiff does not contend that Unifund did anything more in Washington than
2 collect debt. Plaintiff's entire Complaint is based on Unifund's lawsuit to collect his
3 debt. Accordingly, under the plain language of the foregoing statutes, Unifund did not
4 "transact business" in Washington and was not required to register as a foreign
5 corporation with the Secretary of State. *See Falklands Investments, Ltd. v. Lipaev*,
6 2003 WL 22073070 (Wash.App. Div. 1).
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9 **C. As a general partnership, Unifund is not required to register as a foreign**
10 **corporation.**

11 Additionally, as Unifund's Memorandum makes clear, Unifund CCR Partners, a
12 general partnership, is not required under Washington law to register as a foreign
13 corporation. (Memorandum at 6, Doc. 11.) Plaintiff did not cite any authority to the
14 contrary. Indeed, Plaintiff's Complaint alleged that Unifund CCR Partners, the named
15 defendant in this action, is a limited liability company required to register, but
16 Unifund's publicly available collection agency registration shows that it is a general
17 partnership with two general partners. General partnerships are not required to
18 register as foreign corporations. (Memorandum at 6, Doc. 11, and *see* RCW §§
19 23B.01.400(13) and 23B.15.010.)
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23 Plaintiff's only further attempt at rebuttal was to attach to his attorney's
24 Declaration an inactive corporate registration for a Unifund entity. However, that
25 entity is "Unifund Corporation," not Defendant Unifund CCR Partners, the entity
26

1 registered to collect debt in the State of Washington. (Kinkley Declaration at 13-14,
2 Doc. 16.) The inactive status of a separate, non-party entity which did not seek to
3 collect Plaintiff's debt is irrelevant.
4

5 The bottom line is that Unifund is properly registered to collect debt in this
6 state. Accordingly, there is no legal basis for Plaintiff's claim that Unifund's
7 registration status somehow gives rise to a claim under the FDCPA, WCAA, or
8 WCPA. No amount of discovery can save Plaintiff's claim.
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10 **II. THE KENNEY AFFIDAVIT IS NOT ACTIONABLE AS FALSE OR**
11 **MISLEADING**

12 **A. The sufficiency of an affidavit is a matter of state law, and cannot give rise**
13 **to an FDCPA violation.**

14 Deciding a 12(b)(6) motion to dismiss, a District Court already held as a matter
15 of law that Kim Kenney's affidavit does not give rise to an FDCPA claim by, as here,
16 having been attached to state court collection pleadings. (Memorandum at 9, Doc. 11;
17 *Rosales v. Unifund CCR Partners*, No. 08 C 3533, 2008 WL 5156681 (N.D. Ill. Dec.
18 5, 2008).) The crux of Plaintiff's argument is that Ms. Kenney did not have personal
19 knowledge of certain facts asserted in her affidavit filed in Unifund's state court
20 collection suit. Even if true (which it is not), *Rosales* held that lack of personal
21 knowledge supporting an affidavit is a procedural defect under state law. *Rosales*
22 explained that the admissibility of the affidavit may be challenged in state court, and
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1 the affidavit may be excluded if truly lacking in personal knowledge, but such a lack
2 of knowledge does not give rise to an FDCPA claim.

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4 Plaintiff did not even discuss *Rosales* in his Response. Nor did he cite any
5 authority holding that an affidavit lacking in personal knowledge is a false or
6 misleading act giving rise to FDCPA liability. Here, as throughout his Response,
7 Plaintiff cited numerous authority for general propositions of law, but failed to tie
8 those propositions to the allegations in his Complaint.
9

10 **B. Plaintiff failed to adequately plead that Ms. Kenney's affidavit was false or**
11 **misleading.**

12 Indeed, as set forth on pp. 7-8 of Unifund's Memorandum, the allegations in
13 Plaintiff's Complaint do not give rise to FDCPA liability. Plaintiff specifically pled
14 that Unifund misled him by claiming different amounts of interest, including in Ms.
15 Kenney's affidavit. That unsupported argument is addressed in Section IV below.
16

17 Otherwise, except to raise questions about Unifund's right to collect the debt
18 (discussed below), Plaintiff did not specifically plead how the affidavit is false.
19 Nowhere did Plaintiff plead that Citibank did not issue him the applicable credit card
20 or that he did not incur the debt. (Memorandum at 7, Doc. 11.) Likewise, he did not
21 plead that Ms. Kenney failed to rely on information supplied to Unifund by Citibank
22 or, contrary to the authority Unifund cited, that she could not legally do so.
23 (Memorandum at 8, Doc. 11.)
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1 Instead, Plaintiff argued in his Response that he stated a claim based on Ms.
2 Kenney's affidavit because Unifund failed in the affidavit to provide sufficient
3 information establishing its right to collect the debt. That argument is wrong.
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5 As set forth in Unifund's Memorandum at p. 8, n.1, Washington law provides
6 that the assignment of a claim to a validly licensed debt-collector "shall be
7 conclusively presumed valid, if the assignment is filed in court with the complaint,
8 unless objection is made thereto by the debtor in a written answer or in writing five
9 days or more prior to trial." R.C.W. § 19.16.270. Plaintiff did not plead that he
10 challenged the assignment in the Collection Action. In fact, he did not do so, having
11 had a default judgment taken against him for failure to appear. Plaintiff even attached
12 to his attorney's Declaration in this case the unchallenged assignment documents
13 Unifund filed with the state court forming the basis of the default judgment taken
14 against him. (Kinkley Declaration at 5-8, Doc. 16.) Those documents demonstrate
15 the unchallenged and "conclusively presumed" assignment of Plaintiff's debt to
16 Defendant Unifund CCR Partners.¹
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22 ¹ Plaintiff alleges that he does not understand the assignment documents so,
23 therefore, they must be false. There is no basis in law for that argument and, in any
24 event, Plaintiff should have challenged the assignment documents in state court. If
25 this case progresses past Unifund's Motion to Dismiss, Unifund will submit additional
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1 The presumption established by R.C.W. § 19.16.270 further demonstrates why
2 *Rosales* was correctly decided and why the same rationale applies here. As the statute
3 makes clear, whether Unifund introduced sufficient proof in the Spokane County
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5 evidence to the Court further demonstrating what the assignment documents attached
6 to Plaintiff counsel's Declaration already show: that on August 29, 2007, Unifund's
7 purchasing entity, Unifund Portfolio A, LLC ("Port A"), purchased Plaintiff's debt
8 from Citibank; that on August 30, 2007, Port A sold the debt to Cliffs Portfolio
9 Acquisition I, LLC ("Cliffs"), a purchasing entity for Palisades Collection LLC
10 ("Palisades"); and that, pursuant to standing, "forward flow" assignments of debt
11 between Cliffs and Palisades (dated May 28, 2003) and between Palisades and
12 Unifund CCR Partners (also dated May 28, 2003), Unifund is entitled to collect debt
13 Palisades purchases from Port A, including Plaintiff's account, on an ongoing basis
14 without executing additional assignment documents after every sale. Upon Port A's
15 purchase of Plaintiff's debt, Citibank sent Unifund an electronic file with Plaintiff's
16 account data, including the allegedly false information set forth in Kim Kenney's
17 affidavit. All of this information would have been readily available to Plaintiff in
18 discovery had he simply appeared, instead of defaulting, in the state court collection
19 action.
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1 Superior Court, and the circumstances under which Unifund's proof may be
2 challenged, is entirely a matter of state law. If Unifund failed to do so, the state court
3 would have refused to enter a default judgment. Instead, satisfied with Unifund's
4 proof, the state court entered a default judgment in Unifund's favor. There is no basis
5 under federal law to now collaterally attack that judgment or the state law rationale
6 which underlies the judgment.² Whether Unifund has sufficient proof to collect the
7 debt is a matter for the state court to decide, and any failure to do so is not a federal
8 violation.
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12 **III. THE STATE COURT AWARD OF ATTORNEYS FEES WAS PROPER**
13 **AND NOT OTHERWISE SUBJECT TO COLLATERAL ATTACK**

14 **A. Plaintiff did not address three independent grounds why his attorney fee**
15 **claim fails as a matter of law.**

16 Unifund set forth four independent grounds for dismissing Plaintiff's claim that
17 it sought an unlawful attorney fee. (Memorandum at 9-12, Doc. 11.) Any one of
18 those grounds, by itself, requires that Plaintiff's claim be dismissed. Plaintiff
19 completely failed to address three of those grounds. He did not address the authority
20 Unifund cited which holds that: 1) the reasonableness of an attorney fee cannot form
21 the basis of an FDCPA claim; 2) a request for attorneys fees in a pleading cannot form
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23
24 ² See also *Rooker-Feldman* discussion in Section III below. The same
25 rationale applies here.
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1 the basis of an FDCPA claim; and 3) Unifund may seek attorneys fees based on the
2 contract Plaintiff made with Citibank, the credit card issuer. (Memorandum at 11-12,
3 Doc. 11.) Each of those grounds independently entitle Unifund to relief, and they are
4 unrebutted.
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6 **B. Plaintiff's attorney fee claim is also barred by *Rooker-Feldman*.**
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8 Plaintiff spent eleven pages rebutting Unifund's *Rooker-Feldman* argument, the
9 fourth independent basis on which Unifund is entitled to relief on Plaintiff's attorney
10 fee claim. Plaintiff's FDCPA claim arises directly from the state court's judgment
11 awarding attorneys fees to Unifund. As the losing party in state court, Plaintiff now
12 seeks what amounts to appellate review of the judgment. Although Plaintiff correctly
13 notes that independent acts may, in some circumstances, form the basis of a federal
14 claim which would not be barred by *Rooker-Feldman*³, an action based on the state
15 court's decision to award attorneys fees is not such a circumstance. This Court cannot
16 address whether an FDCPA violation occurred without addressing the propriety of the
17 state court's decision itself. Accordingly, any alleged damage is inextricably
18 intertwined with the judgment and is barred under *Rooker-Feldman*.
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22 The Seventh Circuit Court of Appeals recently held that *Rooker-Feldman* bars
23 federal courts from hearing an FDCPA claim under the exact same circumstances.
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26 ³ See, e.g., *Sprinkle v. SB&C Ltd.*, 472 F.Supp.2d 1235 (W.D. Wash. 2006).

1 *Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600 (7th Cir. 2008). In *Kelley*, just like
2 here, plaintiffs claimed that defendants violated the FDCPA by improperly seeking
3 and ultimately recovering attorneys fees. Like Plaintiff in this matter, the *Kelley*
4 plaintiffs argued that their claims arose independently of the state court judgment
5 because their lawsuit sought to remedy only the representations and requests related to
6 attorneys fees and not the fact that the state court awarded attorneys fees. *Kelley*, 548
7 F.3d at 603-604.
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10 The Seventh Circuit rejected this argument, holding that, because the
11 defendants needed to prevail in state court in order to be awarded attorneys fees, the
12 federal court "could not determine that defendants' representations and requests
13 related to attorney fees violated the law without determining that the state court erred
14 by issuing judgments granting the attorney fees." *Id.* at 605. The Seventh Circuit held
15 that "even in light of the Supreme Court's narrowing of *Rooker-Feldman* in *Exxon*
16 *Mobile*, we conclude we are still barred from evaluating claims such as this one,
17 where all of the alleged improper relief was granted by state courts." *Id.*⁴ *Kelley* is
18 indistinguishable from Plaintiff's claims, and the result should be the same.
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23 ⁴ See also, *Witt v. Westfield Acceptance Corp.*, 2002 WL 826372 (S.D. Ind.
24 2002) (FDCPA claim based on request or collection of any charges in excess of those
25 provided by law barred under *Rooker-Feldman*).
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1 The Second Circuit agrees. *See Kropelnicki v. Siegel*, 290 F.3d 118 (2nd Cir.
2 2002). In that case, plaintiff brought an FDCPA claim alleging, among other things,
3 that the defendants made certain misrepresentations in connection with a collection
4 action that resulted in a default judgment being entered against her. Like the plaintiffs
5 in *Kelley* and in the present case, Kropelnicki claimed that she was not attacking the
6 state court's judgment, only the pre-litigation activities of defendants. The Second
7 Circuit held that the claim was inextricably intertwined with the state court judgment
8 because, were the court to accept plaintiff's argument, the "ruling would effectively
9 declare the state court judgment fraudulently procured and thus void. This is precisely
10 the result that the *Rooker-Feldman* doctrine seeks to avoid." *Id.* at 128-129.

14 Like the plaintiffs in both *Kelley* and *Kropelnicki*, Plaintiff in this case seeks to
15 avoid *Rooker-Feldman* by recasting his claims as federal claims independent of the
16 state court judgment. However, it is clear that any adjudication of the issue of
17 whether attorneys fees were improperly requested or recovered cannot be carried out
18 without this Court examining whether the state court's decision to award such fees was
19 proper. Accordingly, Plaintiff's FDCPA claim is inextricably intertwined with the
20 state court judgment and is barred by *Rooker-Feldman*.

24 **IV. UNIFUND CLAIMED AN APPROPRIATE INTEREST RATE AS A**
25 **MATTER OF LAW**

1 Except to provide examples of what Plaintiff termed "debt padding," his
2 Response does not even mention his claim that Unifund violated the FDCPA by first
3 seeking interest at a higher rate, and then at a lower rate. He did not rebut Unifund's
4 argument at pp. 12-14 of its Memorandum that Unifund was entitled under Plaintiff's
5 agreement with the national bank card issuer Citibank to seek interest at the higher
6 rate specified in that agreement (the "Contract Interest Rate"). The Affidavit of
7 Indebtedness was not misleading because Unifund, as the successor-in-interest to a
8 national bank, was entitled to seek interest at the same rate as could the issuing bank.
9 See *Munoz v. Pipestone Fin., LLC*, 513 F.Supp.2d 1076, 1079 (D.Minn. 2007).

13 At p. 24 of his Response, Plaintiff even cited a case holding that "[i]n the
14 absence of an express agreement, an amount [including interest] is 'permitted by law'
15 if a state statute authorizes or allows the fees or charges in question." Plaintiff then
16 ignored that the express cardholder agreement cited in his Complaint allows Unifund
17 to charge interest at the rate set forth in the Affidavit of Indebtedness.

20 Neither did Plaintiff rebut Unifund's argument that its later decision to seek
21 interest at the lower statutory rate (the "State Interest Rate") was not misleading or
22 otherwise in violation of the FDCPA. Instead, Plaintiff simply cited additional
23 authority at pp. 24-25 holding that a charge must be authorized by contract or by state
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1 law. Here, however, as shown by the documents referenced in the Complaint,
2 Unifund only sought interest at rates authorized both by contract and by state law.

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4 As Unifund explained, but Plaintiff refused to address, Unifund was entitled as
5 a matter of law to seek the Contract Interest Rate and then, during litigation, at the
6 lower State Interest Rate. Plaintiff did not cite any authority to the contrary.
7 Accordingly, Plaintiff's claim that Unifund falsely represented or otherwise sought an
8 unlawful interest rate must be dismissed.
9

10 **V. PLAINTIFF'S WASHINGTON STATE LAW CLAIMS ARE BARRED**
11 **BY RES JUDICATA**

12 Plaintiff did not even mention the *Pederson* case Unifund discussed at pp. 14-
13 15 of its Memorandum. *Pederson v. Allied Credit Cos.*, 112 Wash.App.1046 (2002).
14 That case held that WCAA and WCPA claims must be dismissed on res judicata
15 grounds where, as here: 1) they are brought in a separate action instead of in a
16 collection action; 2) in which a judgment was entered; and 3) concern the same
17 transaction as the collection action. As Unifund explained, *Pederson* is
18 indistinguishable from Plaintiff's case and the result should be the same.
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22 Plaintiff spent several pages discussing why FDCPA claims are not compulsory
23 counterclaims in a collection lawsuit. That is irrelevant. Unifund did not argue that
24 Plaintiff's FDCPA claims should be dismissed on res judicata grounds. Instead, based
25 on clear Washington case law, Unifund argued that Plaintiff's claims under the
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1 WCAA and WCPA must be dismissed on that basis. Unifund's case law is
2 un rebutted.

3
4 **VI. PLAINTIFF OTHERWISE FAILED TO STATE A CLAIM UNDER**
5 **WASHINGTON LAW**

6 Even aside from the res judicata bar to Plaintiff's state law claims, he failed to
7 state a claim for relief under the WCAA and WCPA. (Memorandum at 16-18, Doc.
8 11.) These claims are primarily based on Plaintiff's assertion that Unifund is not
9 properly licensed. As set forth above, that claim fails as a matter of law. In his
10 Response, Plaintiff did not otherwise tie any specific allegations in his Complaint to a
11 violation of the WCAA and WCPA. To the extent he relies on his allegations
12 purportedly showing an FDCPA violation, that reliance fails for the same reasons he
13 failed to state a claim under the FDCPA. Those reasons are addressed in Unifund's
14 Memorandum and otherwise in this Reply.
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20 **VII. THE STATE LAW CLAIMS AGAINST KIM KENNEY AS A UNIFUND**
21 **EMPLOYEE MUST BE DISMISSED**

22 Plaintiff did not address the authority Unifund cited which holds that he may
23 not pursue his state law claims against Kim Kenney as an individual. (Memorandum
24 at 18-19, Doc. 11.) Unifund's authority is un rebutted. As an "employee" of Unifund,
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1 which Plaintiff clearly alleged, Ms. Kenney is not subject to suit under the WCAA
2 and WCPA. Plaintiff's state law claims against Ms. Kenney must be dismissed.
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5 CONCLUSION

6 For the reasons set forth in Unifund's Memorandum and as set forth above,
7
8 Plaintiff failed to state a claim upon which relief may be granted. No amount of
9 discovery can save his claims, which should be dismissed as a matter of law.

10 DATED this 19th day of June, 2009.

11 CRUMB & MUNDING, P.S.
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